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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 76

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, an International Labor Union; and NORTHWEST DIVISION 1055 of the AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, a Regional Division of the International Union, *Petitioners*,

v.

WILSON P. LOCKWOOD, *Respondent*.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Idaho

REPLY BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1072

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, an International Labor Union; and NORTHWEST DIVISION 1055 of the AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, a Regional Division of the International Union, *Petitioners,*

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REPLY BRIEF FOR PETITIONERS

Only a few days ago, this Court again reiterated the fundamental principle which governs this case, that "the jurisdiction of the National Labor Relations Board is exclusive and pre-emptive as to activities which are 'arguably subject' to regulation under § 7 or § 8 of the Act. *San Diego Building Trades Council*

v. *Garmon*, 359 U.S. 236, 245 (1959)." *Longshoremen* v. *Ariadne Shipping Co., Ltd.*, No. 231, O.T., 1969, 38 L. Wk. 4207, 4208-4209, decided March 9, 1970. The Idaho Supreme Court in this case refused to bow to this principle even though it held that Petitioners "did most certainly violate 8(b)(1)(A), did most certainly violate 8(b)(2) (i.e., see Krambo Food Stores, Inc., 114 N.L.R.B. 241 (1955)) and probably caused the employer to violate 8(a)(3), all of which constitute unfair labor practices, all of which are subject to the exclusive cognizance of the National Labor Relations Board . . ." (Pet. 51a (footnote omitted)). Respondent evidently recognizes that any such violation does most certainly render his claim pre-empted by Board jurisdiction by virtue of the Act. Accordingly, he asserts he cannot "discern any violation of Section 8(a)(3) or 8(b)(1(A) [or 8(b)(2)]" (Opp. 10). Respondent's inabilities in this respect are self-imposed. He cites no authority and engages in no discussion of the law. His Brief in Opposition ("Opp.") does not even attempt any genuine reply to the authorities and reasoning set forth in the Petition demonstrating that this particular Union conduct is so regulated in the Act as to be certainly either protected under § 7 or proscribed under § 8.

Respondent tenders no reply, for example, to the analysis in the Petition demonstrating that under the Act a Union may not take any action adverse to the employment status of one of its members on the ground that he is in arrears in his dues, unless he is found to be genuinely in arrears under a valid union-security agreement. Accordingly, the very fact that Petitioners proceeded against Respondent on "the *sole ground*" that they believed him in arrears in his Union dues (Opp. 3, 6, 7, 11, 13, 14, 16 (emphasis in original)),

far from removing the case from the Act as Respondent would like, inescapably invokes the Act. Indeed, it virtually echoes the very language of § 8(b)(2) making it an unfair labor practice for a Union "to discriminate against an employee with respect to whom membership in such [labor] organization has been denied or terminated on some ground other than his failure to tender the periodic dues . . . uniformly required as a condition of . . . retaining membership" (Pet. 81a).[1] Respondent musters no reply to the demonstration in the Petition that the State Courts transparently violated the pre-emption principle in this case by adjudicating the very issues which the Board routinely decides in §§ 8(b)(1)(A)-8(b)(2) cases, whether the suspension from Union membership and employment was actually in fact and validly in law for failure timely to tender the dues, or—the only other possible alternative—was for some *other* reason. In all these §§ 8(b)(1)(A)-8(b)(2) cases, the Board is dealing with alleged "arbitrariness and misconduct vis-a-vis the individual member and the union" (Opp. 7). It was precisely such arbitrariness and misconduct which the Congress regulated in the Act by establishing a national policy with respect to union-security clauses.

While Respondent attempts to urge that the employment relationship is not involved, his own recital of the facts, like that of the Court below, demon-

[1] If the Board determines that an employee has been "denied employment to which he was otherwise entitled for no reason other than his tardy payment of union dues" because of the application of a Union "rule apparently aimed at encouraging prompt payment of dues" and the union-security clause may not be validly applied in the premises, the Union commits an unfair labor practice under the Act. *Radio Officers* v. *Labor Board*, 347 U.S. 17, 42 (1954); and cases cited at Pet. 16-19.

strates the inextricable involvement of the employment relationship. Indeed, Respondent's very first sentence recites the fact that he was employed by the Greyhound; and Respondent goes on to refer, as he must under the realities of this case, to the provisions of the union-security clause in the collective bargaining agreement with Greyhound and to the central fact that he lost his employment (Opp. 2-3).

In *Borden* and *Perko,* like this case, the claim was that the Union had taken discriminatory action against the plaintiff because the Union believed its own internal rules had been violated; and because §§ 8(b)(1)(A) and 8(b)(2) might arguably have been violated, this Court reversed State Court judgments for plaintiff upon the ground of pre-emption. This case is blanketed by *Borden* and *Perko.* The fact that membership and dues delinquency were involved in this case, if it is a cognizable difference from *Borden* and *Perko* (Opp. 11-13), makes this case an even more obvious case of pre-emption by Federal law. For this case involves Union conduct not only embraceable under the rubric of "discrimination" but, in addition, regulated in the Act expressly.

Although the Court below acknowledged the conflict between its judgment and that of the Oregon Supreme Court in *Day,* Respondent contends there is no such conflict (Opp. 13-14). This contention appears only in the Argument portion of Respondent's Brief in Opposition; the Statement of the Case portion recognizes the parallelism between the two cases (Opp. 3). The difference Respondent discerns for the sake of his argument is that there was a specific finding of discrimination by the Union in *Day,* whereas there is none in this case. Respondent's assertion about *Day* is not

supported by any citation to that case; and his assertion about this case is in the teeth of the pertinent findings and conclusions of the Idaho District Court.[2]

The Opposition acknowledges that it was "obvious that Respondent would obtain no relief through the National Labor Relations Board" because his charge would receive the identical treatment as Day's which was rejected by the Board "on the ground that there was insufficient evidence of violation of the National Labor Relations Act" (Opp. 4).[3] Unwittingly, Respondent thus concedes the actual, and *a fortiori,* the potential, conflict between State and Federal law which the pre-emption principle is designed to avoid. If Respondent had no claim against Petitioners under the Federal law, as Petitioners submit and Respondent

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[2] The District Court found, as a matter of fact, that "it has over the years been customary within Division 1055 for members to be in arrears in their dues without being suspended, even though said arrearages exceeded 60 days" (Pet. 35a). Further, it concluded, as a matter of law, that "in suspending plaintiff from membership in the union at a time when plaintiff was not so in arrears in his dues that he was properly subject to such suspension, and *contrary to all custom within Division 1055*, defendants, whose officers and agents acted in concert, violated said contract" (Pet. 40a (emphasis added)). Likewise, in its Memorandum Decision, the District Court stated that the union "wished to punish the plaintiff for refusing to go along with the check-off" (Pet. 28a). Finally, in ruling on the Motions to Amend the Findings of Fact, Conclusions of Law and Judgment, the District Court concluded that "overall the record does support a finding that the union had in the past been tolerant of late dues payment" (Pet. 30a). Such distinctive treatment of an individual member surely is "discrimination" under the Act.

[3] Manifestly, Respondent had "an effective mechanism whereby [he] could obtain a determination from the National Labor Relations Board" as to whether the Union conduct of which he was complaining was protected or unprotected. *Longshoremen* v. *Ariadne Shipping Co., Ltd., supra,* at 4209 (concurring opinion).

concedes is the case, the only proper result under the Supremacy Clause is that Respondent should indeed have no remedy in any forum (Opp. 14-16).

The critical issue is not whether Petitioners' conduct was legal or illegal, but in what forum and by what law shall that question be decided: Shall it be the State Courts enforcing State procedures, State substantive law and State labor policy; or shall it be the National Labor Relations Board enforcing national procedures, national substantive law and national labor policy as determined by Congress in the Act? The Supremacy Clause and the pre-emption decisions of this Court dictate that the State law is pre-empted and the Federal law paramount.

CONCLUSION

For the reasons stated herein and in the Petition, this Petition should be granted and the judgment and decision below summarily reversed.

Respectfully submitted,

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